92-1653

RECORD NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

CHESTER RALPH TURNER

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

JOHN H. KENNETT, JR.
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Roanoke, VA 24011
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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, CHESTER RALPH TURNER, petitions for a writ of certiorari to review a judgment of the Supreme Court of Virginia as follows:

1. QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Does a police officer violate Amendment IV of the Constitution of the United States when he deliberately delays the execution of a search warrant refusing to follow the command to search forthwith or without unreasonable delay?

(2) Under the facts of this case, had the probable cause for the search warrant become stale because of the intentional delay of the police officer thereby rendering the search without

probable cause in violation of Amendment 1V of the Constitution of the United States?

11. NAMES OF PARTIES

The parties to this proceeding are:

(1) The Petitioner is Chester Ralph Turner and the Respondent is Commonwealth of Virginia and both are listed on the caption. Counsel for the Respondent is the Attorney General of Virginia, Supreme Court Building, Richmond, Virginia, 22219.

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1V. REFERENCE TO REPORTS AND OPINIONS

On January 8, 1993, the Supreme Court of Virginia denied a petition for rehearing the denial of granting a petition for appeal by its order on February 16, 1992. This appeal was from the Court of Appeals of Virginia who denied a petition for rehearing en banc by order on July 29, 1992 thereby

affirming its published opinion on June 16, 1992 upholding a criminal conviction of your Petitioner by the Circuit Court of the City of Roanoke, Virginia, of possessing drugs with the intent to distribute. The three orders refusing to disturb the published opinion and the published opinion of the Court of Appeals of Virginia are included in the appendix in inverse chronological order.

V. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

Jurisdiction is invoked on the grounds the Petitioner was convicted in a state court of a crime when evidence was inadmissible because it violated Amendment 1V of the Constitution of Virginia made applicable to state court proceedings by Section 1, Amendment X1V of the Constitution of the United States of America; and

(1) The date of a published opinion sought to be reviewed was by the Court of Appeals of Virginia on June 16, 1992; and

(2) After a petition for rehearing by the Court of Appeals en banc was denied, the Supreme Court of Virginia denied a petition for appeal on November 16, 1992; and further denied a petition for rehearing on January 8, 1993 and within ninety days from the filing of this petition. The Supreme Court of Virginia has stayed its mandate until April 8, 1993 and thereafter until disposition of the case by this Court if this petition is filed by April 8, 1993; and

(3) The statutory provisions believed to confer jurisdiction on this Court to review the final judgment in question by writ of certiorari is 28 U.S.C. § 1257(3).

V1. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision which is involves is Amendment 1V of the Constitution of the United States. This provision together with Article 1, Section 10 of the Constitution of Virginia and Va. Code § § 19.2-55 and 19.2-56 are set forth in the appendix.

V11. STATEMENT OF CASE

For convenience, the Petitioner is referred to as "Turner" and the Respondent as "Commonwealth". Numbered page references in brackets preceded by the letter "A" are to pages in the appendix when the information is in the published opinion set forth in the appendix.

According to the published opinion:

> "Turner presents two issues of first impression in Virginia. First, he argues that the trial court erred by refusing

> to suppress evidence seized from his home because the search was not executed "forthwith" as required by Code § 19.2-56. Second, Turner contends that the search violated his fourth amendment rights because probable cause initially supporting issuance of a search warrant had dissipated or become state by the time the warrant was executed. [A-6]

Based on information from an informant, D. F. Ragland, an employee of the City of Roanoke Department of Police with the police rank of sergeant and assigned to its Vice Squad, submitted his affidavit for a search warrant dated January 24, 1989 at 4:55 P. M.; and pursuant to this affidavit, he obtained a search warrant on January 24, 1989 at 4:56 P. M. to "forthwith search" for narcotics a certain house described as 2613 Huntington Boulevard, Northwest, Roanoke, Virginia. Turner owned this house. A described occupant of the house

(apparently Turner) was included in the search warrant. A car parked at said house was not included in the search warrant. The affidavit stated that within the past seventy-two hours, the informant had observed someone in the house offering the drug dolophine for sale. Sergeant Ragland and other police officers immediately went to Turner's house on January 24, 1989 to execute the warrant, but found no one at the house. While there was nothing to prevent the search, they decided to delay the search. Five days later on January 29, 1989, Sergeant Ragland and other police officers went to Turner's house to execute the warrant, but again the Turner was not home. According to the published opinion, they went on four occasions between January 26 and February 4, 1989 but no one was at home and they did not execute the warrant

According to the opinion:

> "On February 4, 1989, Sergeant Ragland was notified by the same informant that the occupant he had previously described had returned to the house and had 'resumed drug sales'. Sergeant Ragland then directed [other detectives] to execute the search warrant. ... As two officers approached the residence on foot, a person who matched the occupant described in the warrant came from the home, got in an automobile, and drove away. The officers followed, stopped the vehicle and searched the occupant and his vehicle. The occupant was [Turner]. The officers returned with Turner to [the house] and searched it. They seized from the residence quantities of oxydone and meperidine. They arrested Turner and charged him with two counts of possession of a Schedule II controlled substance". [A-8]

The legality of the search of Turner's person and car was not an issue because the prosecution only prosecuted for the drugs in the house.

VIII . ARGUMENT

POINT 1: THE SEARCH WAS CONSTITUTIONALLY ILLEGAL BECAUSE THE OFFICERS EXECUTING THE WARRANT INTENTIONALLY VIOLATED THE COMMAND TO SEARCH FORTHWITH OR WITHOUT UNREASONABLE DELAY

The warrant following Va. Code § 19.2-56 required the police to search forthwith. The term "forthwith" is not a mere echo of a medieval royal command:

> "It is an integral principle in our system of law and government that ministerial officials assuming to execute a statute or process upon the property or person of a citizen shall execute it promptly, fully, and precisely. The time of execution is as essential as any other element.
>
> ***
>
> "We think the foregoing propositions are applicable with special directness and force to the nature and purpose of a search warrant. It is a sharp and heavy police weapon, to be used most carefully, lest it wound the

> security or liberty of the citizen. *State v. Guthrie*, 38 A. 368, 369, (Me 1897).

An officer to whom a search warrant is issued has "no discretion, but must proceed with diligence at the earliest reasonable opportunity, to make the search as commanded.*** *McDonald v. State*. 150 N.E. 50, 53 (Ind 1926).

In *Spinelli v. United States*, 382 F.2d 871 8th Cir 1985) reversed on other grounds. 383 U. S. 410 (1888, a federal court of appeals held:

> "A warrant is a court order requiring the police to perform a ministerial function. They must be allowed certain leeway in the performance of this duty, but likewise they must be required to diligently perform according to the court's command. A lapse of up to ten days may be reasonable when the delay is caused by distance, traffic conditions, weather, inability to locate the person or premises to be searched, personal safety, etc. *However a delay of a few hours may be unreasonable if the police are not diligent in*

executing the warrant and the purpose of the delay was to prejudice the rights of a suspect." 382 F.2d 871 at page 885.(Emphasis added)

Delay in execution of a search warrant "when deliberate and made by the officers for the purpose of selecting their own time and for their purpose, whether that purpose be to aid the state or the accused [takes] away from them the power to issue and serve a search warrant." *State v. Perkins*, 285 S.W. 1021, at page 1024 (Mo 1926).

While Va. Code § 19.2-56 permits an outside time of fifteen days, it in no way lessens the command to search forthwith. If the police could not organize the search party for fifteen days, then a delay might be reasonable (depending upon the facts). Here they went to the Defendant's house on the same day of the issuance of the search warrant and could have easily conducted

their search. They deliberately waited and selected their own time. In effect, they converted the specific search warrant into a general search warrant prohibited by Va. Code § 19.2-55 and Art. I § 10 of the Constitution of Virginia and Amendment IV of the Constitution of the United States.

The published decision correctly held the "forthwith" requirement did not mandate the police must immediately execute the search warrant without regard to the circumstances that obtained. It is the policy of the Commonwealth under the Constitutions of the United States and Virginia to protect against unreasonable searches; and warrants are to be executed with reasonable dispatch. Turner finds no fault with this and the holding that Va. Code § 19.2-56 making the command to search forthwith clarified the

constitutional mandates and also requires the policeman to conduct the search as soon as reasonably practical. Thus the issue is what delay is reasonable. The vice of the published decision is that as it then turned to the facts of the case at hand and began to discus whether probable cause had dissipated by the delay, it held that if probable cause had not dissipated, the delay was reasonable; and if it had dissipated, the delay was unreasonable. It ignored the argument that if there was no particular reason for the delay except for the convenience of the police officers, it converted the special warrant into a general warrant.

The published decision held:

> "... The warrant identified both the residence and its occupants as targets to be searched. The officers checked the residence at least six times, only to find the person who was also the object

> of the search was not present. Immediately after learning the described occupant had returned, the officers executed the search warrant. Based on these circumstances, we hold the officers executed the warrant as soon as reasonably practical and, thus, they complied with the directory component of the "forthwith" language.."[A-14]

This is mixing apples and oranges by holding that the probable cause had not dissipated but completely ignoring that on each of the prior six occasions, there was nothing to prevent the search and thus the officers had converted a special search warrant into a general search warrant.

If the warrant described both the house and Turner as separate targets, then two search warrants were required. The very purpose of the constitutional requirement of particularity in describing the place to be searched is the prohibition of a general warrant

giving the police roving permissions to search as they pleased and seize when they pleased. *Stanford v. Texas*, 379 U. S. 476, 85 Sup. Ct. 506, 13 L.2d 431 (1965). Each person in a premises being searched is constitutionally clothed with an individualized protection against an unreasonable search or seizure which is separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the premises. *Ybarra v. Illinois*, 444 U.S. 85, 100 Sup. Ct. 388, 62 L.2d 2386 (1979). Thus Turner has two separate constitutional rights: (1) for his house not to be unreasonably searched; and (2) for him not to be unreasonably searched. The two are separate and distinct. Even though a single search warrant may be used if Turner were found on the premises, *Ybarra v. Illinois, supra*, his inclusion

in the warrant can not serve as an excuse to convert the special warrant into a general search warrant and only search the premises when he is present.

In the oral argument before the Court of Appeals of Virginia, the Commonwealth by an Assistant Attorney General admitted in argument the warrant had to be for the place and not for Turner who could only be searched if found in the place; but he further argued a delay in executing the warrant when Turner was not present would not convert the special warrant into a general warrant unless the police took advantage of the delay to "hit him while he was dirty". If "hitting him while he is dirty" is the test even though Turner's counsel has not found this phrase in case law, then Turner's conviction should certainly be reversed. After checking six times, the police

made the final search when the informant called Detective Ragland and told him Turner had returned and resumed sale. Thus the police delayed until they could "hit him while he was dirty". While this may have justified the police in obtaining another search warrant, the published decision holds:

> "... The officers had learned from the informant just before executing the search warrant that the occupant had returned and resumed sales in the residence. By waiting until the occupant had returned, the officers did no more than that which the warrant commanded. An officer executing the warrant may within the statutory period, execute the warrant at a reasonable time when it appears the most opportune to do so in order to successfully accomplish the purpose of the search, to minimize the risk of having contraband destroyed or secreted, or to protect the safety of the officers." [A. 14].

This is precisely what the Constitution prohibits. The officers are administrative agents who must execute the processes and warrants with reasonable dispatch. They are not to carry a warrant with them in a roving manner executing it when they please. The opinion again mixes apples and oranges by holding that as long as the probable cause had not dissipated, then a delay is reasonable as long as it is also within the fifteen day statutory period. If the police want to hold the warrant until they get a second "tip" showing a search will be successful, they should obtain a second warrant based on the second tip and not hold the first warrant until they can "hit him while he is dirty".

POINT 2: BECAUSE OF THE INTENTIONAL DELAY IN EXECUTING THE WARRANT, THE SEARCH WAS NO LONGER SUPPORTED BY PROBABLE CAUSE AND THUS ILLEGAL.

The information on which the search warrant was issued was stale by the time of its ultimate execution eleven days later, particularly with the additional three day delay between the informant's observation and issuance. As a result, probable cause for this search had dissipated and all evidence so obtained must be suppressed.

The Fourth Amendment of the United States Constitution and its counterpart in Art. I §10 of the Constitution of Virginia provide that no warrant shall issue except upon probable cause. Facts in support of issuance must be "so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro*

v. United States, 287 U.S. 206, 210-211, 53 Sup. Ct. 138, 77 L.ed 206 (1932) (Second warrant requires additional probable cause when first warrant not executed within ten days.) see also *Stovall v. Commonwealth*, 213 Va. 67, 189 S.E. 2d 353 (1972). After a search warrant is duly issued, a delay in its execution is only permissible if probable cause continues until the time of execution. *Stovall v. Commonwealth, supra*. In determining whether probable cause existed for issuance of the present search warrant, both the period between the informant's observations and issuance, as well as the period from issuance to execution of the warrant must be considered. The affidavit indicates that the informant's observations were made within seventy-two hours, or three days before the issuance. When a transaction is

said to occur "within " a given time period, "it must be assumed that the transaction took place in the most remote part of the given period," for purposes of a probable cause determination. *Commonwealth v. Novak*, 233 Pa. Super. 236, 335 A.2d 773, 774 (1975). Therefore, in the present case the Court must assume that the informant's observations occurred a full three days before the search warrant was obtained. Taken together, the unnecessary delays before and after issuance of this search warrant constituted a total of fourteen days.

Simply counting days is not enough. When making a staleness determination, "each case turns upon the nature of the warrant, the circumstances surrounding its issuance and execution and the nature of the premises to be searched." *State v. Melankis*, 129 W.Va. 317, 40

S.E.2d 314, 318 (1947). A court must consider a all the variables including:

> "the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in any ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed." *Anderson v. State*, 24 Md App.128, 331 A. 2d. 78, 106 (1975); Aff'd *Anderson v. Maryland*, 427 U. S. 463 (1976)

The character of the criminal activity at issue in the present case is a factor which most clearly illustrates staleness. The affidavit alleges an isolated incident of drug possession and distribution. "Where the affidavit

recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time". *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972). Furthermore, the nature of the crime (drug possession) militates against a finding of probable cause several days beyond the alleged incident. A single act of drug possession or sale, as alleged in this case, should support a finding of probable cause for only a few days at best, absent facts tending to show otherwise. Drugs are easily movable and disposable; and there was no reason for the police to believe that the dolophine tablets would remain in Turner's possession eighteen days after they were first observed by the informant.

In *People v. Siemieniec*, 368 Mich. 405, 118 N.W.2d 430 (1962) the defendant

was convicted of possessing and selling liquor without a license on the basis of incriminating evidence discovered pursuant to a search warrant. The warrant was issued on the basis of informant observations made four days earlier. The Michigan Supreme Court reversed the conviction, however, holding that probable cause had dissipated during the four day delay. The court explained:

> "Whether the affiant's observations are made 4, 6 or 66 days before application of a search warrant, the warrant may issue only upon a showing that reasonable cause exists to believe illegal activity is occurring at the time the warrant is sought... [T]here was nothing in the affidavit presented in this case to indicate that the acts observed on September 13 continued to occur on September 17." 118 N.W. 2d at 432.

The old saying is "the proof of the pudding is in the eating". Here the

police had checked six times and apparently determined illegal activity was not continuing in the house and consequently purposely failed to execute the search warrant. Then after they had concluded the probable cause had dissipated, they received a second tip and based on the second tip executed the original warrant instead of obtaining a second warrant. Even though they executed the warrant within the fifteen day period before it became void, it was a new probable cause as clearly evidenced by the fact that on the six occasions they refused to execute the warrant knowing the information on which the warrant was based was stale. Probable cause is suppose to exist at the time of issuance of the warrant and a warrant is not to be held until new probable cause is found and then it can be executed.

POINT 3. SPECIAL REASON THIS COURT SHOULD GRANT CERTIORARI

When counsel for Turner began practicing law, illegally obtained evidence was admissible. The exclusionary rule adopted by the federal courts in *Weeks v. United States*, 232 U.S. 383, 34 Sup. Ct. 341 58, L. Ed 652 (1914) was made applicable to state court proceedings under the Fourteenth Amendment by *Mapp v. Ohio*, 367 U. S. 643, 81 Sup. Ct. 1684, 6 L. 2d 1081 (1961).

Prior to that time, the search warrant was a joke. The police never obtained one. When it became mandatory, the police began a program of massive resistance. Instead of standing up to the policemen as the Court does any other violators, the Court began to yield. The Court still gives lip service to the exclusionary rule but

interprets the facts as not being a violation of the Fourth Amendment. This has resulted in an unacceptable deterioration of the right of privacy. In any rational interpretation, the police in the case at bar did not act as ministers in serving the warrant but converted it to their own use by holding it until the time was right for execution. Under any reasonable interpretation, the police violated the sacred rights of privacy by converting the warrant into a general warrant so hated by the colonists. The courts rationalized this horrible conduct to avoid an acquittal on a technically.

It would be far better to call a spade a spade. If the police violated Turner's rights of privacy, this Court ought to say so and not use some artificial dodge which hurts the rights of privacy of all of us. If this Court

does not wish to reverse a conviction of Turner because it was merely a technicality then this Court should say so; but, of course, we will revert to the days when a search warrant was a joke. If this Court wishes to restore law and order with police compliance, it may very well do so by applying the exclusionary rule to this violation of a Fourth Amendment right. There have been so many recent interpretations that are obvious violations of the Fourth Amendment are not violations of the Fourth Amendment, it may be difficult to now begin holding the line. Nevertheless, according to the published decision being appealed, this is a case of first impression at least in Virginia and this Court should establish guidelines by hopefully upholding the right of privacy and the exclusionary rule; in any event, the Court should

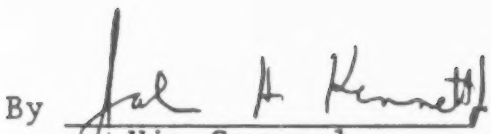
not erode the right of privacy further by holding a search warrant may be for both a person and a place and then the police may hold the warrant until the person is in the place.

IX. CONCLUSION

By its decision on January 8, 1993 set forth in the appendix of this petition denying the Petitioner a review of the published decision in the appendix, the Supreme Court of Virginia decided an important issue of federal constitutional law contrary to the decisions of this Court and contrary to the decisions on the same issue of courts of last resort for the several states. Accordingly a writ of certiorari should be granted to review the decision and answer these important questions of federal constitutional law.

Respectfully submitted,

CHESTER RALPH TURNER

By 
His Counsel

John H. Kennett, Jr.
133 Kirk Avenue, Southwest
Roanoke, Virginia 24011
Telephone: (703) 345-0946
Counsel for Petitioner

X. PROOF OF FILING AND SERVICES

I, John H. Kennett, Jr., counsel for the Petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 8th day of April, 1993, I filed the foregoing petition for writ of certiorari with the Clerk of the Supreme Court of the United States by mailing forty copies of same together with the filing fee in a duly addressed envelope by first class mail with postage thereon prepaid addressed to Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, 1 First Street, Northeast, Washington, D.C. 20543; and I also served a true copy of the foregoing

petition on the Respondent by mailing three copies of same in a duly addressed envelope by first class mail with postage thereon prepaid to Thomas E. Daniel, Assistant Attorney General of Virginia, 101 North Eighth Street, Richmond, Virginia 23219.

Counsel for Petitioner

STATE OF VIRGINIA,

CITY OF ROANOKE, TO-WIT:

The foregoing proof of filing and service was subscribed and sworn to before me by John H. Kennett, Jr., this 8 day of April, 1993.

My commission expires: 10-31-96

Notary Public

X1. APPENDIX

The appendix consists of:

(1) A copy of the order of the Supreme Court of Virginia denying a rehearing of

the petition for appeal on January 8, 1993.[A-1]

(2) A copy of the order of the Supreme Court of Virginia on November 16, 1992 denying the petition for appeal. [A-2]

(3) A copy of the order of the Court of Appeals of Virginia on July 29, 1992 denying a petition for rehearing en banc before the Court of Appeals of Virginia. [A-3]

(4) A copy of the published decision of the Court of Appeals of Virginia on June 16, 1992 sought to be reversed. [A-4]

(5) Pertinent portions of the text of Constitutional Statutory provisions cited in part 6 of his petition. [A-17]

A P P E N D I X

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY THE 8TH DAY OF JANUARY, 1993.

CHESTER RALPH TURNER,

Appellant

against Record No. 921359
Court of Appeals No. 1577-90-3

COMMONWEALTH OF VIRGINIA,

Appellee

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 16th day of November, 1992, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach
Clerk

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON MONDAY THE 16TH DAY OF NOVEMBER, 1992.

CHESTER RALPH TURNER,

Appellant

against Record No. 921359
Court of Appeals No. 1577-90-3

COMMONWEALTH OF VIRGINIA,

Appellee

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Keenan did not participate in the consideration of this case.

A Copy,

Teste:

David B. Beach
Clerk

By
Deputy Clerk

IN THE COURT OF APPEALS OF VIRGINIA ON WEDNESDAY THE 29TH DAY OF JULY, 1992

CHESTER RALPH TURNER,

Appellant

against Record No. 921359
Circuit Court No. CR89-769

COMMONWEALTH OF VIRGINIA,

Appellee

Upon a Petition for Rehearing
En Bank Before the Full Court

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 6th day of June, 1992 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing en banc in this case. Code § 17-116.02(D).

A Copy,

Teste:

Patricia G. Davis
Clerk

Salem

CHESTER RALPH TURNER

v.

COMMONWEALTH OF VIRGINIA

No. 1577-90-3

Decided June 16, 1992

SUMMARY

Defendant was convicted of possession of a controlled substance with intent to distribute. He argued that the search warrant issued for his residence was not executed "forthwith" as required by statute and that the probable cause supporting issuance of the warrant had dissipated or become stale by the time the warrant was executed (Circuit Court of the City of Roanoke, Clifford R. Weckstein, Judge).

The Court of Appeals affirmed, holding that, under the circumstances, the warrant was executed in a timely fashion and that probable cause still existed at the time the warrant was executed.

Affirmed.

HEADNOTES

(1) **Criminal Procedure—Search Warrants—Execution.**—The term "forthwith" as used in Code § 19.2-56 does not mean immediately or as soon as physically possible and does not mandate that the officers must immediately execute the warrant without regard to the circumstances that obtain.

(2) **Criminal Procedure—Search Warrants—Execution.**—Under Code § 19.2-56, it is necessary that search warrants be executed with some promptness in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated; the statute includes a codification of the constitutional requirement that the search must be conducted while probable cause continues to exist and also

defines a state policy that search warrants are to be executed with reasonable dispatch.

(3) **Criminal Procedure—Search Warrants—Execution.**—Code § 19.2-56 requires the officer to conduct the search as soon as reasonably practicable under the circumstances but accords officers a limited amount of flexibility in deciding when to execute warrants; in some situations, delay is unavoidable, necessary or even desirable.

(4) **Criminal Procedure—Search and Seizure—Probable Cause.**—Probable cause, as the very name implies, deals with probabilities; these are not technical but are factual and practical considerations in everyday life on which reasonable and prudent men, not legal technicians, act.

(5) **Criminal Procedure—Search and Seizure—Probable Cause.**—Probable cause exists where the totality of the circumstances set forth in the affidavit support a common sense decision by the magistrate that there is a fair probability that contraband or evidence of a crime will be found in a particular place; probable cause is a fluid concept turning on the assessment of probabilities in particular factual contexts and is not readily or even usefully reduced to a neat set of legal rules.

(6) **Criminal Procedure—Search and Seizure—Probable Cause.**—While time alone is not controlling, evidence that one was illegally in possession of drugs on a given date is not probable cause to believe that he possesses illegal drugs three days thereafter; when a warrant has been issued based upon probable cause, whether probable cause continues to exist at the time the warrant is executed depends on the length of the delay and the nature of the observed criminal activity — whether the activity is an ongoing enterprise or an isolated incident.

(7) **Criminal Procedure—Search and Seizure—Probable Cause.**—A warrant based on a known presence of contraband at the premises rests on the expectation that the contraband will remain there until the warrant is executed; when delay occurs between the issuance and execution of a search warrant, whether probable cause continues to exist at the time the warrant is executed depends on the facts and cir-

cumstances of the case, including the nature of the unlawful activity alleged, the length of the activity and the nature of the property to be seized.

(8) **Criminal Procedure—Search and Seizure—Search Warrants.**—No defect inheres in a warrant that orders officers to search both a dwelling and a person so long as the warrant is supported by probable cause to search both.

(9) **Criminal Procedure—Search Warrants—Execution.**—An officer executing a search warrant may, within the statutory period, execute the warrant at a reasonable time when it appears most opportune to do so in order to successfully accomplish the purpose of the search, to minimize the risk of having the contraband destroyed or secreted, or to protect the safety of the officers; the fact that the officers delay executing a search warrant until a time the officer determines will be most opportune to yield a successful result does not invalidate the warrant so long as probable cause continues to exist at the time of execution.

COUNSEL

John H. Kennett, Jr., for appellant.

Thomas C. Daniel, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

OPINION

COLEMAN, J.,—Chester Ralph Turner appeals his convictions on two counts of possessing with intent to distribute oxycodone, also known as Percocet, a Schedule II controlled substance, in violation of Code § 18.2-248. Turner presents two issues of first impression in Virginia. First, he argues that the trial court erred by refusing to suppress the evidence seized from his home because the search warrant was not executed "forthwith" as required by Code § 19.2-56. Second, Turner contends that the search violated his fourth amendment rights because the probable cause initially supporting the issuance of the search warrant had dissipated or become stale by the time the warrant was executed.

We find no merit in Turner's contentions. Code § 19.2-56 contains two time limitations, a fifteen-day bar and a "forthwith" requirement. The fifteen-day bar serves to extinguish absolutely the viability of a search warrant if not executed within fifteen days, regardless of circumstances. The "forthwith" requirement of Code § 19.2-56 is directory and defines the policy of the Commonwealth that search warrants be executed as soon as reasonably practical while probable cause continues to exist. "Forthwith" is a practical and flexible standard which must conform to the necessities of circumstances. Because the question whether the police officers complied with the "forthwith" requirement necessarily entails a determination whether probable cause continued to exist at the time the warrant was executed, our analysis of the first question will decide the second issue—whether the information upon which probable cause was found had dissipated or become stale.

On January 24, 1989, at 4:56 p.m., Sergeant D.F. Ragland of the Roanoke City Police Department obtained a search warrant authorizing the search of the residence located at 2614 Huntington Boulevard, N.W., Roanoke, Virginia, and the search of an occupant who was specifically described by age, appearance, and physical characteristics. The warrant was issued on facts provided by a reliable informant who had observed, within a seventy-two hour period before the issuance of the warrant, "a large quantity of white tablets being offered for sale" by a specifically described individual at the Huntington Boulevard dwelling. The affidavit stated that the person described was an occupant of the dwelling. The informant, a self-admitted drug user, advised the officer that he believed, based on his familiarity with the appearance and packaging of drugs, that the tablets were Dolophine (methodone).

On the day the warrant was issued, Sergeant Ragland and other officers of the Roanoke City Police Department went to the Huntington Boulevard residence to execute the search. Finding no one there, and pursuant to a division policy against executing search warrants at unoccupied residences, the officers did not conduct the search.

On January 26, 1989, the officers again went to execute the warrant at the Huntington Boulevard address and, once more, found the residence unoccupied. On four more occasions between January 26 and February 4, 1989, Sergeant Ragland directed the officers to check the residence for the presence of someone, but on

each occasion, the officers found it unoccupied and did not execute the warrant.

On February 4, 1989, Sergeant Ragland was notified by the same informant that the occupant he had previously described had returned to the Huntington Boulevard residence and had "resumed drug sales." Sergeant Ragland directed Detective M.A. Lee to execute the search warrant. Detective Lee and several other officers went to the Huntington Boulevard residence. As two officers approached the residence on foot, a person who matched the occupant described in the warrant came from the home, got in an automobile, and drove away. The officers followed, stopped the vehicle, and searched the occupant and his vehicle. The occupant was Chester Ralph Turner, the appellant. The officers returned with Turner to the Huntington Boulevard residence and searched it. They seized from the residence quantities of oxycodone and meperidine. They arrested Turner and charged him with two counts of possessing a Schedule II controlled substance.[1] Turner moved to suppress the evidence seized from the Huntington Boulevard dwelling, which motion the trial court denied. His appeal challenges that ruling.

Code § 19.2-56 provides that "[t]he [search] warrant shall command that the place be *forthwith* searched." (emphasis added). The statute further provides that "[a]ny search warrant not executed within fifteen days after issuance thereof shall be returned to, and voided by, the officer who issued such search warrant." Code § 19.2-56.

Turner contends that the officers unduly delayed executing the search warrant by going to the residence on six occasions and not conducting the search, and that by doing so, they violated Code § 19.2-56 and the judicial directive in the warrant to search "forthwith." Turner argues that, although the statute imposes a maximum limit of fifteen days by which a search warrant must be executed, the "forthwith" requirement in the statute imposes a substantive restriction that officers execute the warrant "forthwith" but no later than fifteen days. "Forthwith," he contends, means immediately and without undue delay. He also contends

[1] The legality of the search of the appellant's person and vehicle are not at issue because the Commonwealth prosecuted Turner only for the offenses arising from the evidence seized at the dwelling.

that the fourth amendment requires that the probable cause supporting the issuance of a search warrant must continue to exist at the time the warrant is executed. Based on the eleven day delay in executing the warrant, he argues that the officers did not search "forthwith," and that the probable cause to search the residence had dissipated and no longer existed. Thus, he argues that the evidence seized should be suppressed because the statute and fourth amendment were violated.

(1-2) By establishing a fifteen-day limitation period in Code § 19.2-56, the General Assembly did not intend to provide that search warrants executed within that time would be conclusively presumed to have been executed timely. Such an interpretation would render the "forthwith" language of the statute meaningless, a result that we cannot attribute to the legislature. *See Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984). The "forthwith" requirement has an independent substantive meaning. "Forthwith", within the context of Code § 19.2-56, does not mean immediately or as soon as physically possible. *See, e.g., United States v. Wilson*, 491 F.2d 724, 725 (6th Cir. 1974) ("forthwith" construed to permit reasonable delay). It does not mandate that officers must immediately execute the search warrant without regard to the circumstances that obtain. The fact that the statute provides that the warrant expires if not executed within fifteen days means that some latitude is provided for the time within which the search may be conducted. But, under that statute, "it is . . . necessary that search warrants be executed with some promptness in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." *United States v. Nepstead*, 424 F.2d 269, 271 (9th Cir.), *cert. denied*, 400 U.S. 848 (1970). The statute includes a codification of the constitutional requirement that the search must be conducted while probable cause continues to exist, but it goes beyond that. The "forthwith" requirement defines the policy of the state that search warrants, which are the foremost safeguard to protect against unreasonable searches proscribed by the fourth amendment, are to be executed with reasonable dispatch.

Some courts in jurisdictions with statutes having a "forthwith" provision similar to Code § 19.2-56 have held that the "forthwith" requirement is satisfied so long as the warrant is executed within the number of days allowed by statute. *See, e.g., State v.*

Edwards, 98 Wis. 2d 367, ____, 297 N.W.2d 12, 16 (1980). However, as noted, this approach renders the "forthwith" requirement meaningless. Several federal courts when construing the "forthwith" requirement of former Rule 41, Fed. R. Crim. P., which rule contained a maximum ten-day period for executing the search, held that "forthwith" imports the independent requirement that the government prove that any delay in executing the warrant within the statutory time limit was "reasonable." *See United States v. Lemmons*, 527 F.2d 662 (6th Cir. 1975); *United States v. Wilson*, 491 F.2d 724 (6th Cir. 1974); *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971); *United States v. Dunnings*, 425 F.2d 836 (2d Cir. 1969). Under this approach, in deciding what is "reasonable," courts look at the justification for and length of the delay to decide whether the search was conducted "forthwith."

(3) This approach comports with our view that the provision in Code § 19.2-56 that a search warrant be executed "forthwith" is a directive to police officers to execute the warrant with reasonable dispatch and without undue delay. Thus, in addition to codifying the constitutional mandate, it also requires the officer to conduct the search as soon as reasonably practicable under the circumstances. This construction of Code § 19.2-56 accords police officers a limited amount of flexibility in deciding when to execute search warrants. In many situations, some delay is unavoidable, necessary, or even desirable. Moreover, this approach, which is grounded in the fourth amendment requirement that probable cause must also exist at the time a search warrant is executed, *see United States v. Bowling*, 900 F.2d 926, 932 (6th Cir. 1990); 2 Wayne R. LaFave, *Search and Seizure* §4.7(a), at 261 (2d ed. 1987), is consistent with Virginia case law that state search and seizure protections are coextensive with federal constitutional protections. *Kirby v. Commonwealth*, 209 Va. 806, 808, 167 S.E.2d 411, 412 (1969); *Chevrolet Truck v. Commonwealth*, 208 Va. 506, 508, 158 S.E.2d 755, 757, *cert. denied*, 391 U.S. 964 (1968).

We turn to whether the facts set forth in the affidavit in support of the search warrant for the Huntington Boulevard residence furnished probable cause to believe that evidence of criminal activity or contraband was still located at the residence at the time the officers executed the search warrant eleven days after its issuance.

(4-5) "Probable cause, as the very name implies, deals with probabilities. These are not technical; they are factual and practical considerations in every day life on which reasonable and prudent men, not legal technicians, act." *Derr v. Commonwealth*, 242 Va. 413, 421, 410 S.E.2d 662, 666 (1991) (quoting *Saunders v. Commonwealth*, 218 Va. 294, 300, 237 S.E.2d 150, 155 (1977)). Probable cause exists where the totality of the circumstances set forth in the affidavit supports a common sense decision by the magistrate that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. Because it is a fluid concept based on probabilities, the continued existence of probable cause at a particular time is dependent upon the circumstances. So long as probable cause continues to exist, the search will be valid. *See United States v. Bedford*, 519 F.2d 650, 655 (3d Cir. 1975).

(6) While the Virginia Supreme Court has not addressed the issue raised by this case, it has considered the related issue of a delay between learning the facts that gave rise to probable cause and the issuance of a warrant based on those facts. *See* 2 Wayne R. LaFave, *Search and Seizure* §4.7(a) at 262 n.11 (2d ed. 1987). In *Stovall v. Commonwealth*, the Court concluded that "[w]hile time alone is not controlling, evidence that one was illegally in possession of drugs on a given date is not probable cause to believe that he possesses illegal drugs 72 days thereafter." 213 Va. 67, 70, 189 S.E.2d 353, 356 (1972). In *Huff v. Commonwealth*, the affidavit used to issue two successive search warrants a week apart recounted that the defendant, who had been previously convicted of possessing a Schedule II controlled substance with the intent to distribute, had engaged in criminal drug activities "in recent weeks" and "on a recent date." 213 Va. 710, 716, 194 S.E.2d 690, 695 (1973). The Court in *Huff* held that

> [t]he commonsense conclusion to be drawn from such facts is that the pattern of criminal practice probably was yet continuing on the date of the affidavit; that drugs would probably continue until the warrant was executed; and that drugs would probably be found at that time in Huff's residence.

Id. at 717, 194 S.E.2d at 696. *See also Pierceall v. Commonwealth*, 218 Va. 1016, 243 S.E.2d 222 (1978). Thus, by analogy, when a warrant has been issued based upon probable cause, whether probable cause continues to exist at the time the warrant is executed depends on the length of delay and the nature of the observed criminal activity, that is, whether the activity is an ongoing enterprise or an isolated incident.

(7) "[A] warrant based on a known presence of contraband at the premises rests . . . on the expectation that the contraband will remain there until the warrant is executed." *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989) (citing Wayne R. LaFave, *Search and Seizure* 701 (1978)). When delay occurs between the issuance and execution of a search warrant, whether probable cause to search continues to exist at the time the warrant is executed depends on "the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity and the nature of the property to be seized." *United States v. McCall*, 740 F.2d 1331, 1336 (4th Cir. 1984). As the Maryland Court of Appeals explained in *Donaldson v. State*, 46 Md. App. 521, 420 A.2d 281 (1980):

> The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.

Id. at 530, 420 A.2d at 286 (quoting *Andresen v. State*, 24 Md. App. 128, 172, 331 A.2d 78, 106, *cert. denied*, 274 Md. 725 (1975), *aff'd*, 427 U.S. 463 (1976)).

The warrant was issued based upon probable cause to believe that "a large quantity of white tablets" believed to be Dolophine would probably be found at Turner's Huntington Boulevard residence. The delay of eleven days between issuing the warrant and the search, standing alone, did not vitiate the reasonable belief that contraband would be on the premises and in the possession of the described occupant. *See Donaldson*, 46 Md. App. 521, 420 A.2d 281 (1981) (eleven day delay in execution did not invalidate search pursuant to warrant); *United States v. Byars*, 762 F.Supp. 1235 (E.D. Va. 1991) (nine day delay upheld under Fed. R. Crim. P. 41(c)(1) and Code § 19.2-56); *State v. McLankis*, 129 W. Va. 317, 40 S.E.2d 314 (1946) (nine day delay was in compliance with "forthwith" command); *United States v. Dunnings*, 425 F.2d 836 (2d Cir. 1969) (nine day delay did not invalidate warrant or search pursuant thereto). *See also McCall*, 740 F.2d 1331 (4th Cir. 1984) (probable cause for issuance of warrant found to exist despite seven month lapse between observation of contraband and application for warrant); *Davidson*, 54 Md. App. 323, 458 A.2d 875 (1983) (nineteen day delay between controlled buy and issuing warrant).

The nature of the activity in which the informant observed Turner engaged would lead one reasonably to believe that contraband would still be located in the residence when the officers conducted the search. Admittedly, the informant had on only one occasion observed "a large quantity of white tablets [believed to be Dolophine] being offered for sale." The informant indicated that the tablets were being offered for sale from a residence at Huntington Boulevard in Roanoke. The fact that the drugs were described as "a large quantity" and that they were "being offered for sale" from a residence suggest a continuing enterprise. The selling of drugs, by its nature, is an ongoing activity. *See Donaldson*, 46 Md. App. at 530, 420 A.2d at 286. Although isolated sales of narcotics unquestionably occur, the fact that the informant observed "a large quantity" of white tablets "being offered for sale" would lead a reasonable person to believe that some of the tablets believed to be Dolophine remained at the residence after the informant had observed them. The evidence would further suggest that this activity was not an isolated incident. Consequently, the police officers reasonably could have concluded that the contraband remained at the residence after the informant left and would remain there until the person who had been en-

gaged in the illegal sale of the drugs returned, at which time they would execute the search warrant.

Under the circumstances of this case, the police officers, by waiting eleven days to execute the warrant, did not violate the "forthwith" provision of the statute or the fourth amendment. The officers executed the warrant as soon as reasonably practicable under the circumstances. The warrant identified both a residence and its occupants as targets to be searched. The officers checked the residence at least six times, only to find the person who was also the object of the search not present. Immediately after learning that the described occupant had returned, the officers executed the search warrant. Based on these circumstances, we hold that the officers executed the warrant as soon as reasonably practicable and, thus, that they complied with the directory component of the "forthwith" language in Code § 19.2-56.[3]

(8-9) Furthermore, the search was not invalid because the police officers waited until Turner returned to the residence before executing the search warrant. The warrant directed the officers to search both the residence and a specifically described occupant. No defect inheres in a warrant that orders officers to search both a dwelling and a person so long as the warrant is supported by probable cause to search both. *See United States v. Ward*, 682 F.2d 876 (10th Cir. 1982); *People v. Sunday*, 109 Ill. App. 3d 960, 441 N.E.2d 374 (1982). *See also* 2 Wayne R. LaFave, *Search and Seizure* § 4.9(a), at 291 (2d ed. 1987). The officers had learned from the informant just before executing the search warrant that the occupant had returned and had resumed sales in the residence. By waiting until the occupant had returned, the officers did no more than that which the warrant commanded. An officer executing a search warrant may, within the statutory period, execute the warrant at a reasonable time when it appears most opportune to do so in order to successfully accomplish the purpose of the search, to minimize the risk of having the contraband destroyed or secreted, or to protect the safety of the officers.

[3] We do not intend to imply that the only circumstances relevant to the issue whether the warrant was executed "forthwith" are those relating to the nature or scope of the persons or premises to be searched. Other relevant considerations might include the safety of the officers executing the warrant, the safety of others in the area and other competing law enforcement interests which preclude an immediate execution of the warrant.

In other words, the fact that the officers delay executing a search warrant until a time the officer determines will be most opportune to yield a successful result does not invalidate the warrant so long as probable cause continued to exist at the time of execution. While the purpose of a search warrant is to seize illegal contraband, functionally it is an investigative tool often used by police officers to apprehend those who are engaged in criminal activity. Furthermore, the prophylactic purpose of the search warrant processes is not undermined by permitting police officers "to make the judgment that the averments of the affidavit are again satisfied, after a period of doubt." *Dunnings*, 425 F.2d at 840. Protection of the individual's privacy is furthered by requiring that a search warrant be executed with reasonable promptness while probable cause continues to exist within the time limits provided by statute. *See United States v. Bedford*, 519 F.2d, 650, 656 (3d Cir. 1975) (quoting *Dunnings*, 425 F.2d at 840); *see also, United States v. Byars*, 762 F. Supp. 1235, 1239 (E.D. Va. 1991) (officers delayed executing search warrant for nine days awaiting a narcotics shipment to ensure that drugs, the "tools of the business," would be present in the apartment).

Accordingly, we hold that the police executed the warrant as soon as reasonably practicable under the circumstances and that the probable cause that initially supported the search warrant being issued for the Huntington Boulevard residence and the occupant continued to exist eleven days later when the warrant was executed. Thus, the officers executed the warrant "forthwith" within the meaning of Code § 19.2-56[3] and in compliance with the requirements of the fourth amendment.

[3] Because we hold that the officers complied with the directory component of Code § 19.2-56 and with the constitutional continuing probable cause requirement, we leave for another day whether a statutory violation, without a constitutional one, requires suppression of the evidence obtained as a result of the violation. *But see Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986); *Horne v. Commonwealth*, 230 Va. 512, 339 S.E.2d 186 (1986); *cf. United States v. Bedford*, 519 F.2d 650, 657 n.17 (3d Cir. 1975) (statutory violation warrants suppression only where defendant can show prejudice attributable to unreasonable delay); *United States v. Dunnings*, 425 F.2d 830, 841 (2d Cir. 1969) (Smith, J. concurring) (evidence should not be suppressed in absence of prejudice attributable to delay).

We find no error in the trial court. Therefore, we affirm the convictions.

Affirmed.

Koontz, C.J., and Elder, J., concurred.

PERTINENT TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS CITED IN PART V1 OF THIS PETITION

(1) Amendment 1V of the Constitution of the United States as follows:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

(2) Article 1, § 10 of the Constitution of Virginia as follows:

> "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievious and oppressive, and ought not be granted.

(3) Code of Virginia of 1950 as amended to date:

Va. Code § 19.2-55 as follows:

> "Any person having authority to issue original warrants

willfully and knowingly issues a general search warrant or a search warrant without affidavit required by § 19.2-54 shall be guilty of malfeasance."

Va. Code § 19.2-56....
The warrant shall command that the place be forthwith searched, either in day or in night, and that the objects or persons described in the warrant, if found there, be seized." ...